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Problems of Robert Nozick's Principle of Justice in Acquisition: Nozick's Misunderstanding of the Nozickean Proviso and Its Consequences [1]

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Abstract

This paper examines Robert Nozick's principle of justice in acquisitions that he suggests for the just appropriation of property. The work is mainly concentrated on the proviso suggested for the principle. The contention here is situated on the issues of Nozick's reconstruction of Locke's original version of the proviso and his claim that the principle is a 'historical and non-patterned principle'. I will textually criticise Nozick's understanding of his own version of the proviso and, while clarifying his own version of the proviso, I will raise contextual problems concerning his misunderstanding. Ultimately, these issues are considered as crucially vital problems for this latter claim. His principle, conclusively, is not obliged only to serve for private property, but it can also work for other systems of property as well. This last point is quite unexpected and unwanted for Nozick himself. Hence, the principle clamped with the Nozickean proviso, does not compatible with Nozick's claim of being 'historical and non-patterned'.

Key Words: Robert Nozick, Libertarianism, Political Philosophy, Private Property, Entitlement Theory, Initial Acquisition.

INTRODUCTION

Robert Nozick in, "Anarchy, State, and Utopia" [2] defends the claim that the state should only have "the function of protection against force, theft, fraud, enforcement of contracts, and so on" [3]. He opposes any other justifications of the state, which are aimed to extend its functions. Accordingly, theories, such as liberalism or utilitarianism, will support many enforcement rights, which are against the basic liberties of men. His project of the 'minimal' or 'night-watchman state' is constructed on the rights of property and individual freedom. His conception of the minimal state turns out to be a 'dominant protection agency', which protects the rights [4] of its clients. In this big framework of the minimal state, Nozick gives an account for distributive justice; namely the 'Entitlement Theory'. By means of this, Nozick wants to disregard many roles of the state that we can observe in liberal theories. For instance, most significantly, the coercive power of the state concerning redistributive justice is one of the elements of the state that Nozick wants to eliminate.

In this article I will argue against Nozick's claims about the initial acquisition of property. So, any other part of his theory is not going to be issued in this paper. Hence, my objections will directly attack to his notion of right to property and the principles of just holdings, no further argument about his theory of the minimal state will be derivative from my claims here.

For Nozick, property ownership is an *essential*

liberty in ASU and the initial acquisition of property is legitimate. I will claim that Nozick's principle for the just initial acquisition contains problems that make his claims problematic. In order to reach this conclusion, first I will underline two crucial inconsistencies: the distinction between time-slice principles of justice and historical principles [5], and the distinction of patterned and non-patterned principles [6]. After this consultation, I will discuss the proviso that Nozick suggests for the principle of just initial acquisitions of holdings. In order to do that, first I will put forward the Lockean proviso, which underlies Nozick's adaptation of it. Following this, I will show Nozick's version of the proviso and how he fails to construct his version and misunderstands his own formulation of the proviso. In terms of this, the clarification of the Nozickean proviso will proceed. Considering the Nozickean proviso, I will argue that his principle cannot be a historical and non-patterned principle. And finally, due to Nozick's failure of seeing private property without rivals, I will show how his proviso can lead the Entitlement Theory towards systems like common ownership or joint ownership.

A Preliminary Discussion of the Entitlement Theory: 'Historical and Non-patterned Principle'

In Chapter 7 of "Anarchy, State, and Utopia" Nozick attacks those theories, which are claimed to have an unjust criterion for the distribution of property in society (i.e. Rawlsian and utilitarian theories), and he presents his defense of the Entitlement Theory. In this section, I will

briefly explain the general framework of the Entitlement Theory and the distinctions of 'historical' and 'end-result' principles, and the 'patterned' and 'non-patterned' principles. In terms of this, I will touch some preliminary issues concerning his position on these distinctions. I will argue that the argument for the historicity of the principle of transfer of just holdings cannot work for the principle of initial acquisitions of just holdings.

Nozick says that justice in holdings has three major components. Firstly, there is the *original acquisition of holdings*, which is the appropriation of unowned externality: "This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held (...) we shall refer to the complicated truth about this topic as the principle of justice in acquisition" [7]. Secondly, there is the *transfer of holdings*, which means to be the transition of property from one person to another: "Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society. The complicated truth about this subject we shall call the principle of justice in transfer." [8] Finally, there is the *rectification of injustice in holdings*, which is used for the rectification of unjust past transfers of holdings or initial acquisitions of holdings. According to Nozick, "This principle uses historical information about previous situations and injustices done in them, and information about the actual course of events that flowed from these injustices, until the present, and it yields a description of holdings in the society" [9]. So, for Nozick if a person acquires a holding entirely in accordance with the first two, then he is entitled to that holding. And if there is an entitlement, which is not accordance with these two principles of just holdings, then it should be rectified in accordance with the principle of rectification.

Before dealing with the principle of initial acquisition of holdings, I will first outline the distinction between the '*historical principles* and *end-result principles*', which is very important for Nozick because he wants to argue against other theories of distributive justice by accusing them for being '*end-result principles*'. Nozick claims that the entitlement theory of justice is a historical principle. This means that it looks for the process by which distribution came about. On the other hand, end-result principles deal with the distribution by how things are distributed. For the latter a patterned principle determines how things are distributed [10]. As an example of the latter, an egalitarian would examine a distribution of property by looking at the current distribution and determine who gains what and then apply an egalitarian principle in order to redistribute property.

On the other hand, a historical principle will look at past instances and actions of people when they acquire some property. Nozick thinks that because people might have acquired property justly, they are entitled to property, and the present inequality of holdings may not

indicate that there is an injustice in holdings. Similarly, if there are instances in the past that show that an injustice took place when there was a transfer of holding, then we can rectify it not because there is unequal share in the present situation but historically there was an instance of injustice in the acquisition, or transfer of that holding [11]. It is, I think, fair enough to see the distinction between these two types of principles.

Nozick continues to say that the entitlement theory has the essence of being a historical principle and at the same time it has also another characteristic, which is being a non-patterned principle. Nozick calls, "[...] a principle of distribution *patterned* if it specifies that a distribution is to vary along some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions. And let us say a distribution is patterned if it accords with some patterned principle" [12]. As we can see from this definition of patterned principles any principle, which has the ground of any guidance and, which gives account for the non-distributive command will fall short of being an un-patterned principle. For instance, a utilitarian principle, which says that the distribution should be made by maximizing the total amount of happiness, will be a patterned principle because it has a pattern of action, which is directed by the former principle. Because, the utilitarian principle does not deal with the 'distributional matrices', which means it has nothing to do with how the distribution occurred, it will follow this non-distributional pattern to execute the distribution of holdings. We can extend the instances of those by giving the examples of principles, which has moral patterns, or egalitarian purposes. In this case, the plausible principle for Nozick is: if the set of holdings results from just acquisition of holdings, or just transfer of it, then it is a principle that concerns only how the distribution have been historically made of. As he says that if some people receive a share of income, or gain it from gambling or receives a gift, etc, then these are the instances of non-patterned principles.

An intuitive reply to his former concern, which is also realized by Nozick, is to ask whether it is really the case that principles of the entitlement theory are un-patterned principles. Nozick has a quick reply to this. He says,

Though the resulting set of holdings will be unpatterned, it will not be incomprehensible, for it can be seen as arising from the operation of a small number of principles. These principles specify how an initial distribution may arise (the principle of acquisition of holdings and how distributions may be transformed into others). The process whereby the set of holdings is generated will be intelligible, though the set of holdings itself that results from this process will be unpatterned [13].

As we can see Nozick thinks that even when we have these principles of just holdings, we cannot say that they are patterned, because they are the principles, which concerns the distribution of holdings historically and

not any other kind of criteria, which cannot be directly related to the distribution of holdings [14].

In this case, we may say that in comparison to the patterned current time-slice principles the principle of just transfer would be sufficient to be non-patterned. Because, this principle only concerns how a holding is obtained and not how this action is morally or politically good or bad, it seems that the principle of transfer has no pattern of regulation. The reason why Nozick's principle of transfer might work is, as Nozick puts it, "Things come into the world already attached to people having entitlements over them" [15]. This statement would be accurate, if we look for the occasions, in which there are transfers of property. When we look at an act of transfer of property we might assume that the holding owned by the person who will transfer it and if the transfer is just, meaning that the person who will get the holding without theft, murder, etc, then the transfer is just and this is exactly what a historical non-pattern principle of just transfer requires.

However, as many thinkers who oppose to Nozick say, the initial acquisition of property cannot be examined in the same way. The reason is simple. In order to look at a distribution as being just or unjust we need to know that the holding had been already acquired. In the case of an unowned object (basically un-appropriated land), it is not easy to determine that the person who appropriates the object has the right to own this land historically. It is because there would have been no past to the initial case by definition, and also the idea of historicity cannot be applied to the initial case of appropriation. I will come to that point in the following sections.

One reply would be that we do not need to worry about the initial case of appropriation. Nozick claims that "things come into the world already attached to people having entitlements over them" [16], and he may continue saying that this assumption is sufficient to construct the entitlement theory as enough as to be hypothetically accurate. However, I think, Nozick's consideration for the principle of just transfer would not work in the same manner for the principle of just initial acquisitions. Hillel Steiner remarks on this as the following,

The problem here arises from the fact that, unlike other objects, the objects of appropriative rights do appear from nowhere and out of nothing and are not the results of individuals' past actions. It is therefore not surprising that Locke's rule for appropriation as well as Nozick's adaptation of it prove, in the event, to be structural or end-state principles rather than historical ones [17].

As Steiner clearly puts it, because there is no historical entitlement of appropriation, no historical principle can be made for the distribution of initial holdings of natural resources. Because of this reason, which Nozick is also aware of, there must be a principle or a pattern in order for the acquisition to be just. Now then the next question to examine is what's Nozick's solution to the initial acquisition of holdings?

Nozick considers the explanation of the initial acquisition as "adding a bit of complexity into the entitlement theory" [18]. However, actually, this assumption is the core of the fallacy of the whole entitlement theory. Why? Because, as I have pointed out Nozick starts the idea with an apparently false premise: that "things come into the world already attached to people having entitlements over them" [19]. It is apparently false because as it is a fact and also conceivable that human beings cannot create anything *ex nihilo* [20], so that any property must be in the first place unowned. Therefore, there is at least theoretically a step in which no property is owned by anyone. Ultimately, this step follows how the property initially acquired by people. Therefore, the right question to ask is: what right do people acquire over unowned land? G. A. Cohen makes a similar point. He asks, "[...] apart from how he in particular came to own it, with what right it came to be anyone's private property in the first place" [21]. As he asks rightly, if the land is unowned how can someone acquire it and at the same time no other person has the right to acquire the same piece of materiality. In this case, even Nozick does not suggest a new principle of initial acquisition, but rather he adapts Locke's principle of acquisition. He says that the principle of acquisition "is best approached by considering Locke's attempt to specify a principle of justice in acquisition". At this point before explaining what's wrong with Nozick's understanding of the Lockean proviso, first I want to explain briefly Locke's property rights and the Lockean proviso.

John Locke's Property Rights and the Lockean Proviso

In "The Second Treatise of Government" [22] Locke talks about property rights by saying that the world is initially 'given' to men in common [23]. That means that initially no one has a right to announce his ownership over anything and that makes the world initially un-owned. However, he continues to claim that men have 'reason to make use of it [the world] to the best advantage of life and convenience' [24]. In the following proposition Locke holds that because man is rational in that sense, he has a property in his own person; 'this nobody has any right to but himself'. So, Locke considers man as 'self-autonomous' [25] in the sense that man as a rational being has a right to preserve himself and a right to use nature by means of his own duties. Thus, he concludes, "Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property, [...] at least where there is enough and as good left in common for others." [26] So, even if the world is initially not owned by anyone, Locke thinks that labor and work of rational man gives rights to the man to own the things that are joined to his own labor as long as he left enough for other people for performing their own labor with the world. Ultimately, this is the

Lockean proviso, which has two main components: (a) 'mixing labor' and (b) 'enough and as good left in common for others'.

Then he continues by saying that laboring is the case in which the private and the common property are distinguished. Labor gives man the right to have private property because man, when he is laboring, adds something more to nature and ultimately it makes the land his own property [27].

Now we can ask, what does Locke mean by the idea of mixing labor with un-owned land? In this case, as Nozick contends, there could be two possible objections and concerns about the idea of 'labor-mixing'. First of all, "If a private astronaut clears a place on Mars, has he mixed his labor with ... the whole uninhabited universe or just a particular plot?" [28] The point here is that what is the extent of mixing the labor with the material in question? What distinguishes the land in use and the rest of it? If I appropriate an un-owned mountain, do I have also the right to have the trees on it? As Rousseau puts it,

When Nuñez Balboa stood on the shore and took possession of the southern seas and of South America in the same of the crown of Castile, was that enough to dispossess all the inhabitants and to exclude all the other princes of the world? If so, such idle ceremonies would have had no end; and the Catholic King might without leaving his royal chamber have take possession of the whole universe, only excepting afterwards those parts of his empire already belonging to other princes [29].

Secondly, we may ask whether I own a material by inextricably mixing some of my property with that material. Nozick asks, "If I own a can of tomato juice and spill it into the sea so that its molecules mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" [30] I think Nozick's worry is quite plausible. However, Locke has another idea to fix that problem, because otherwise the rights of appropriation would have been extremely weird.

This next step is as Jonathan Wolff points out the following: "One special feature of course, is that in the normal course of things 'mixing your labor' with something makes it more valuable, or, at least, more useful. Locke does indeed attempt to add weight to his justification of the appropriation of property by appealing to this consideration." [31] In this respect, the former concern about Locke's view may be met. This is simply because, for the case of the astronaut, we can say that when he cleans a piece of land on Mars, he doesn't either make the entire universe valuable, or the whole planet. His labor may give value to the extent of what he cleans and nothing more. For the case of the tomato juice, I think Locke would say that the man, who acts in this way, makes a big mistake by wasting his tomato juice when he spills it into the sea [32]. That is because his action gives no more value to the sea. This is not because the proviso is not satisfied but because the action in question is not

an appropriate type of action to be considered as 'mixing labor'.

According to these worries, Nozick thinks that how appropriation came about is irrelevant, (so as the 'mixing-labor' criterion') and what is important is the impact of appropriation on other people. Nozick thinks that there is an ambiguity of the former. He asks, "Why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?" [33] This means that adding a bit of value by mixing the labor does not necessarily permit one to own the thing. In this case, just like in the tomato juice case, 'mixing labor' cannot be an appropriate criterion for legitimate acquisition of property. It is simply too ambiguous to determine the balance between the value added to the material and the quantitative threshold for this, which is needed for the evaluation.

Nozick's Interpretation of the Lockean Proviso and the Reconstruction

Nozick prefers to bypass this criterion of 'mixing labor' and stick to the criterion of 'enough and as good left in common for others'. For the latter, one can legitimately appropriate a certain amount of x , if there will surely be enough left for the others. Even if the appropriator has got the whole amount of it, this would make the situation better for others by counterbalancing the loss of right to appropriate that amount of x (For instance, by compensating them with money). In this case, how the appropriation came about is less important than whether the situation of others worsens by the appropriation of that particular appropriation [34]. This is for Nozick one legitimate way of putting the Lockean proviso ('enough and as good left in common for others'). So, if one's appropriation is worsening my situation, then I have the right to object to that appropriation. This is basically, what Nozick takes as his proviso. He says, "Locke's proviso that there be 'enough and as good left in common for others' (sect. 27) is meant to ensure that the situation of others is not worsened" [35].

To understand the extension of this new notion of the Proviso, we should first look at Nozick's argument on page 176 in ASU; so called the 'zipping back' argument. Let's assume that the first man Z who is in a situation, in which for him not enough and as good was left to appropriate. In this case, the last person, whose appropriation left Z without the chance to appropriate, actually worsens Z 's situation. Therefore, Y 's appropriation is illegitimate under the Lockean Proviso. Then, the next to the last person X , who appropriates while leaving Y in a worse position, is also not permitted to appropriate. Ultimately, with this logic, if we go back to the first person A , his appropriation is a permanent one because; following the proviso, there is no other person for A to make the situation worse for [36]. One consequence for this argument, which Nozick criticizes, is that we can conclude that the proviso cannot be applied to all instances of appropriation but

only to the initial one.

However, if this is the case, and also we avoid the ‘labor mixing’ criteria, then we can think why and how the appropriation of property in the initial stage can be legitimate. Concerning this we can refer to Benjamin Tucker’s following conclusion: “It should be stated that, however, in the case of land, or of any other material the supply of which is so limited that all cannot hold it in unlimited quantities, Anarchism undertakes to protect no titles except such as are based on actual occupancy and use” [37]. Apart from Tucker’s individualist anarchist views, the worry here is that intuitively an appropriation of a limited material must be limited because initially everyone has the right to appropriate. In this case no one could have a better title to appropriate more than others, but all can have the equal liberty to use it. This worry is about being skeptical about the necessity of private property in order to have better account of distributive justice.

Contrary to this, Nozick wants to establish unlimited rights to property. He thinks that the argument from zipping back is too quick. He adds the following concerns to legitimize the property rights of appropriation. He makes a distinction between two forms of Lockean proviso. One way of worsening another’s appropriation is ‘by losing the opportunity to improve his situation by a particular appropriation or any one’; and secondly ‘by no longer being able to use freely what he previously could’ [38]. Nozick calls the latter the *weaker* form and the former is the *stringent* form of the proviso. Nozick thinks that the *weaker form* of the proviso is appropriate for his entitlement conception of justice. This is so because only the weaker form of the proviso can solve the regress problem in the zipping back argument. In the case of the weaker form even if one could not appropriate any more or no more, one may have another types of opportunities to make one’s situation better. In this case, even if there is not enough and as good for other persons, there would be other things, which ‘counterbalance the diminution in opportunity’ [39], and it is raised by the foregoing appropriation. His point with regard to the ‘counterbalance the diminution in opportunity’ is the following:

Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most effectively (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don’t have to convince any one

person or small group to hire, and so on [40].

It is important here to note that Nozick does not defend the utilitarian principle favoring private property. He argues for these facts about the beneficences of private property in order to support the Lockean conception of “enough and as good left over”. This claim refers back to counterbalancing ‘the diminution in opportunity’ by saying that these benefits of a system of private property can provide sufficient counterbalancing for the loss of people who are left with less or no property at all. From here all we can see is that the Nozickian adaptation of the Lockean proviso says that appropriation of something will be illegitimate if it worsens another person’s situation and would have no effective benefit for the system [41]. If this explanation is satisfactory, we can look at what is misleading in Nozick’s own understanding of the Proviso.

Clarification and the Consequences of the Nozickian Proviso

In the previous section, I pointed out Nozick’s distinction between the weaker form of the proviso and the stringent form of it. The following definitions are the weaker and stringent forms of the proviso:

The weaker form W: “X must not cause Y to lose the opportunity to use freely what he previously could”.

The stringent form S: “W (X must not cause Y to lose the opportunity to use freely what he previously could) and (S1): X must not cause Y to lose the opportunity to improve his situation by a particular appropriation or any one, unless something counterbalances the diminution in opportunity”.

G. A. Cohen against Nozick has raised the argument here [42]. He thinks that, first; S1 in the stringent form differs from W in three different ways. Firstly, S1 focuses on Y’s opportunities to appropriate things; on the other hand W focuses on the opportunities to use them. Secondly, S1 requires Y’s being not to lose possible opportunities to improve his situation; unlikely W does not require any possible improvement in Y’s situation, instead of this it just prohibits any possible worst off situation that Y may encounter then.

Finally, S1 has a compensation clause, and W has not. For the third distinction, Cohen argues that W is weaker than S not because it does not contain a compensation clause, but it is weaker because W is a conjunct of S. The reasons are the following. The compensation clause in S1 only satisfies S1 without satisfying W, which means that the compensation that Nozick thinks stands for any possible worsening situation, in which Y should be compensated. In this case Cohen thinks that Nozick confuses the distinction between W and S1. Ultimately, Nozick’s distinction is actually between W and S2, which is S1 without its compensation clause:

(S2): X must not cause Y to lose the opportunity to improve his situation by a particular appropriation or any one.

Cohen gives three reasons why Nozick confuses his distinction. On page 176 in ASU, Nozick tries to avoid the regress argument by giving the distinction between W and S. He thinks that the stringent form creates a regress, but W does not. However, as Cohen clearly states, the compensation clause of S prevents the regress there [43]. In this case, S2 would create regress, but S does not. Recalling the regress argument, the problem was about how to prohibit the last appropriation, which is about the last bit of property. In this case, if we look at S1 (so as S), it provides a compensation, which will work for those who cannot appropriate anymore. However, S2 cannot trigger the regress. It is simple because any appropriation in the initial stage will be a lost in opportunity for the others to improve their situation.

Secondly, on page 178 in ASU, Nozick says, "I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke". However, the proviso on page 178 [44] is not W but rather S1, which includes the compensation clause. In this case, Nozick would have referred neither to the weaker form nor S2 but S1 (so S) in this passage. Therefore, Nozick again confuses his distinction.

Finally, Cohen powerfully claims that the weaker form of the proviso prevents the transformation of all common land into private property, while some would end up with no private property [45]. However, in Nozick's capitalist system it is defensible that some people will end up with no property because the system will compensate the loss of the propertyless people [46]. Unfortunately, not the weaker form but the stringent form of the proviso can express the idea of compensation. For instance, imagine a mine, in which a good reserve of chemical sources has been found. In this situation imagine two persons –for simplicity, one of which is a scientist and other is a farmer. The scientist has appropriated the mine, while he knows that by appropriating the mine he will cause the farmer to lose the opportunity to use the mine freely –which he previously could use. In this case, from the passage in ASU p. 177, we can say that the scientific work of the scientist by using these resources will be an indirect compensation for the farmer because the farmer will benefit the good consequences of these scientific researches. However, in order to satisfy such compensation Nozick should have appealed to the stringent form and not the weaker form of the proviso. Thus we can conclude that Nozick needs S1 (so S) rather than W.

Ultimately, we will conclude that the proviso that Nozick wants to establish has the stringent form. As we see, even if he says that he needs to buy into the weaker form of the proviso, he actually uses and needs the stringent form of the proviso because of the necessity of the compensation clause. Hence, we can legitimately and freely consider the stringent form as the Nozickian proviso.

The next issue, which should be solved, is whether the clarified version of the Nozickian proviso leads the principle of initial acquisition towards being a historical and patterned principle. In other words, what are the consequences of the more truly stated proviso in terms of the principles of initial acquisition? Here I will answer the former question positively.

In this case, if we accept that the Nozickian proviso has the structure of S, then we should study its compensation clause more carefully. Using the proviso as the guideline, every possible appropriator should consider, a "baseline" of well-being, which posits every other's well-being in the absence of his appropriation. Hence this guideline would give a procedure for the possible appropriations of holdings. This need of the baseline indicates that at least some data of the past or a procedure is necessary for a legitimate compensation. In this case, Nozick would not claim that the compensation would be executed based on past data (historical records) simply because it will be the first acquisition of that property and there would be no past of its entitlements (there was no appropriation before). Hence, the baseline cannot be a historical guidance. As Steiner [47] points out there is a problem of the market value of the holdings in the initial stage. Nozick suggests that reference should be made to the economic value, i.e., market prices, of appropriated natural resources [48]. However, it is really hard to imagine that there could be any reference in the initial stage. Any set of prices determined in the initial stage would not be accurate because the prices would be the same even if individuals appropriated the land, for which the appropriation would have been different. In other words, for a fixed market value, an exchange of property is primarily necessary in order to determine the posterior land prices. Because the initial acquisition is the step before any possible exchange, we cannot talk about a fixed market value [49].

Secondly, it seems necessary that a procedure or a pattern is needed. Even if somehow we might think that a fixed market value can be obtained, it should not necessarily fit into people's personal valuations. Imagine that I have appropriated 50 m² fields and 1 m² field has a fixed market value of 100 boxes. The compensation value is also fixed and that is 25 boxes per 1 turn. Following this, if I need to be compensated for 5 m² fields, then I am expected to get 125 boxes. Why should I pay attention to this initial market value? I may think that my effort to irrigate this field is more than the compensation value. On the other hand, someone else might think that the compensation value is fair. In that case, because we are still in a state of nature, I am not sanctioned to sell my field. So, the compensation cannot work. Therefore, a pattern would be necessary for the initial appropriation even if the market value were fixed.

Finally, I will argue the following. Nozick's proviso requires, as Nozick himself agrees, a restriction on the

freedom of appropriators to use their property however they want. This is again the necessity of compensation. Especially, when this issue comes to the scarce resources, Nozick is stricter on the issue. On page 180, he says:

Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstances, admittedly no fault of his, brings into operation the Lockean proviso [his interpretation] and limits his property rights.

Even if his example is too strict to agree with him, the problem of restriction is not always too obvious. The notion of monopoly and the necessities of life must be determined in order for a justification of the restriction of freedom on the use of property. As Steiner notes, "But what is to count as (i) monopoly, and (ii) the necessities of life, is historically a much-disputed issue, and around it revolve some of the more profound ideological controversies of the last hundred years" [50]. Even if we put aside such disputes, we can still argue about the waterhole case. In the case of the waterhole, even if it is necessary for him to compensate others, still it is unanswered how he may charge any cost for the water. It is surely his property and he wants to charge a fee for the water. Even if this question would be unnecessary, I cannot see any other way, which is non-patterned. 'Counterbalancing the diminution of opportunity' is not sufficient to show its practical application. Therefore, it must be patterned and this must be acceptable for Nozick as well.

To conclude this discussion, I will say that it seems to me that it is hard for Nozick to deny that the principle of initial acquisition of just holdings is not a historical and patterned principle. The compensation clause requires a way of determination of the lost and its compensation. However, no historical approach seems to me possible in the case of initial appropriation. In that case, it should be an end-result principle. If it is an end-result principle, then it requires a pattern for a just compensation. The aim here is not try to find a pattern for Nozick, but to show that his principle should contain a pattern in order to compensate others. Unfortunately, problems that I have argued above make it difficult for Nozick to construct a pattern, which is distinct from the patterns that he criticizes in ASU.

Two applications of the Nozickean Proviso

If we accept that the Nozickean Proviso has the stringent form and the compensation clause of the proviso creates a need of pattern, then I will continue arguing whether its use stands for a particular appropriation (first use) or does it stands for the justification of private property in general (second use) [51]. For the former use, I will argue that it cannot be applied to the entitlement theory and it cannot be the ends of the proviso. For the second use, I will argue that there is a problem, which Nozick didn't realize. For Nozick there is only one

counterfactual case against private property that satisfies the proviso, which is 'no appropriation of land' at all. However, I will show that using the proviso, we can imagine a reasonable situation, in which no private property entailed, but rather possibly a joint or common [52] ownership is preferred. Therefore, there seems to me an inconsistency between the means of the proviso and the ends of the entitlement theory as a whole.

I will start with the first use that is the justification of particular appropriations. The question here is that if someone appropriates something, then does it worsen anyone's conditions (similar to the waterhole example). At least Nozick thinks that the proviso enables us to be sure that it is necessarily sufficient to determine the justification of one particular appropriation because if the appropriation worsens someone's situation, then the compensation clause is ready to do its job. However, as I have pointed out in the previous section, it is dubious to think that compensation clause is sufficient in the initial acquisition of holdings to determine the justness of particular appropriations. To recall the objections, we have the problem of reference to the past, which excludes his argument from being a historical argument. The next one is the problem of the fixed market value. For this objection, I have also noted that even if we can think of it as being fixed, there appears another problem, which is people's personal valuation. Hence, we have a problem of market valuation vs. personal valuation. Finally, we have the problem of restriction of freedom. It derives from the fact that determination of what monopoly is and the necessities of life are too ambiguous for the initial stage of acquisition. Hence, it is hard to claim that any restriction of freedom is legitimate in the initial stage. Because of these problems the proviso cannot work for particular appropriations.

For the second claim, the worry is not as straightforward as the former use of the proviso. Wolff puts this use of the proviso clearly when he says, "[...] the question to ask is whether those who hold little or no private property, are better or worse off than they would have been had there been *no appropriation at all* [italic added]" [53]. Surely, the implication of this is on the page 177 in ASU. Nozick asks, "Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property?" In the following passage Nozick tries to show that this system is preferable because of its benefits to everyone. Finally, he concludes, "These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the "enough and as good left over" proviso, not as a utilitarian justification of property." [54] Here we can see that his aim is to show that the proviso can actually provide us with a justification of private property in general. He thinks that the system of private property can make those who have less or no appropriation at all better off. Therefore, his comparison

is between the private appropriation of property and *no appropriation at all*. The latter is, as he thinks the base line for comparison.

To recall, what I am claiming is that while the first use of the proviso is problematic for Nozick, the second use seems safer. Because he gives reasons, which are nothing to do with the worries for the first use, I cannot argue against it in the same manner. Ultimately, I will claim that Nozick can defend the private property in general by the second use of it. However, unfortunately, that does not mean that his principle of initial acquisition is in a complete security now. The base line that he proposes creates a problem for the proviso as well.

Nozick thinks that the only base line for comparison is the case, in which no appropriation would have occurred, which indicates that the land *L* continues to be unowned. However, on page 181 in *ASU*, when Nozick talks about the cases similar to the case of water hole in the desert, he says, “The result may be coextensive with some condition about catastrophe, since the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe”. Here again Nozick thinks that leaving the water hole in the desert not appropriated is not a good solution because it would be unproductive to leave it in such a way. On the other hand, he thinks, the system, which allows private property would be better, because even when someone monopolizes the water hole, it makes the productiveness of the water hole increased. Moreover, he should also compensate the loss of others due to the fact that he should follow the proviso.

However, intuitively, we can grasp many other counterfactuals or baselines, for which we can compare them with the system containing private property. These would be, for instance, common ownership, joint-ownership, etc. For instance, Hillel Steiner points out,

One solution is to require that no individual’s appropriation of unowned natural objects may ever be so great as to preclude any other present or future individual from making a similar appropriation. This stringently conservationist interpretation of the just initial acquisition requirement, unwieldy as it would be, seems to be only one which can circumvent the necessity of periodic redistribution [55].

Basically, what Steiner here claims is that private appropriation in the initial acquisition would make the future generations worst off and no individual appropriation of property can be justifiable because they would have been vague in terms of such problems.

Cohen underlines the reasons why another type of baseline is preferable and is neglected by the entitlement theorists. He says, “[...] entitlements theorists tend to neglect the value people may place on the kind of power relations in which they stand to others, a neglect that is extraordinary in supposed libertarians professedly committed to human autonomy and the overriding

importance of being in charge of one’s own life” [56]. Cohen’s aim is to show that exploitation can be the product of privatization of the land. We may agree on his consideration that people will prefer not being harmed by exploitation, while withdrawing all of the benefits of the system of private property. In this case, it cannot be true by saying that “it is not only *permissible* that people enclose the commons, but is in fact *morally obligatory*” [57]. If this is the case, then we should find historical evidence that can establish this claim. Elman Service made a historical claim about the archaic civilizations. He says, “In all of the archaic civilizations and historically known chiefdoms and primitive states, the stratification was mainly of two classes, the governors and the governed –political strata, not strata of ownership groups. [...] At least this is not recorded in the historical cases, not is it visible in the archaeological record” [58]. Basically, we can at least claim that in the initial state the private property had got nothing to do with the political means. Despite the fact that we are not so sure, I will say that Service’s historical claim and Cohen’s philosophical claim are enough to conclude that private appropriation is not *morally obligatory*.

From all of these considerations, it is sufficient to conclude that there are different baselines –opposing to Nozickean baseline, in which the appropriation could take place. For the common ownership, on the one hand, the land is appropriated collectively, for joint-ownership, on the other, the land is owned privately but the right to use it depends on a consensus agreed with by the landowners. So, these baselines must be taken seriously by Nozick in order to show that system of private property is much more desirable. My intention here is not to compete with Nozick in terms of which of these systems is preferable, but I have pinpointed that at least one of these other systems could be accumulated by the Nozickean proviso as well. In short, the Nozickean proviso can establish a system, which entitled no private property but a common or joint ownership of the holdings.

CONCLUSION

In this paper, I’ve showed that Nozick’s main claim that the Entitlement Theory is a historical and non-patterned principle is not exhaustive for all of its compounds. Conclusively, the principle of justice in acquisitions is not a historical and non-patterned principle. The Nozickean proviso, which is adapted from Locke’s original version, is not a good candidate of a non-patterned principle because of its compensation clause. Additionally, the case of the initial appropriation cannot be historical because it has no past indexed for it. In a summary, it is appropriate to say that Nozick’s misunderstanding lies behind all of these problems. As we have seen, the form that he textually commits has consequences, which necessitates pattern(s) for distribution and appropriation of property. In this case, it is a bad luck for him that he

hadn't realized these problems. After all, the core of his theory is apparently the principle of justice in acquisition and the proviso, which initiates it.

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- [1] Some parts of this paper are originally published in "Can the Nozickian Proviso Guide *Homo habilis*? Cognitive and Evolutionary Criticism of the 'Historicity' of the Entitlement Theory" (Erdenk 2010).
- [2] Nozick 1974. Abbreviated as ASU.
- [3] Ibid., p. ix.
- [4] Here basically Nozick considers the rights to holdings, self-autonomy and the rights to participate to the free-market.
- [5] Ibid., pp. 153-155.
- [6] Ibid., pp. 155-160.
- [7] Ibid., p. 150.
- [8] Ibid.
- [9] Ibid., p. 152.
- [10] Ibid., p. 153-154.
- [11] Ibid., p. 155.
- [12] Ibid., p. 156.
- [13] Ibid., pp. 157-158.
- [14] Here I mean that the principle, except the principle of rectification, do not direct the distribution of property like the patterned principles.
- [15] Ibid., p. 160.
- [16] Ibid.
- [17] Steiner 1977a, p. 44.
- [18] Nozick, p. 174.
- [19] Ibid., p. 160.
- [20] As a response for a possible objection to this, I will say that what I mean by *ex nihilo* is there is a material need in order to produce something (i.e. in order to aggregate a field is needed, so the production in this field is not *ex nihilo* but depended on the existence of the field).
- [21] Cohen 1986a, p. 119.
- [22] Locke 1980. Abbreviated as ST.
- [23] ST, I: 1.
- [24] ST, V: 26.
- [25] Not to overwhelmingly extend the paper, I do not want to fall into a discussion that may argue what 'self-autonomy' means. I will leave that phrase odd not to emphasize on it. Any argument from this phrase is tolerable for the paper.
- [26] ST, V: 27.
- [27] ST, V: 28-29.
- [28] Nozick, p. 174.
- [29] Rousseau 1954, p. 67.
- [30] Nozick, p. 175.
- [31] Wolff 1991, pp. 103-4.
- [32] Here, it is clear that this action does not conflict with the proviso. However, this specific action is simply inconsistent with Locke's understanding of the mixing labor with the land (See. ST, V).
- [33] Nozick, pp. 174-5.
- [34] Ibid., p. 175.
- [35] Ibid.
- [36] Ibid., p. 176.
- [37] Quoted in: Wolff 1991, p. 108.
- [38] Nozick, p. 176.
- [39] Ibid.
- [40] Ibid., p. 177.
- [41] From the quote above we can infer this. Nozick means to say that all of the consequences of a given appropriation should be considered in order to determine whether this appropriation worsen another or not. In this case if a particular appropriation improves the system of private property such that it has similar effects as the ones listed above than this particular appropriation can be said to be legitimate, regardless of the other's loss of opportunity to appropriate.
- [42] Cohen 1986a, p. 120, footnote 17.
- [43] Ibid., p. 121.
- [44] Nozick says; "Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one" (Nozick, p. 178).
- [45] Cohen 1986a, p. 122.
- [46] See the long quotation on pages 9.
- [47] Steiner 1977a, p. 45-47.
- [48] Nozick, p. 177.
- [49] For instance, one can claim 100 boxes for one turn of potato field, while someone else claims 500 boxes. Who will have the burden of proof, if compensation becomes necessary?
- [50] Steiner 1977a, p. 47; see the footnote.
- [51] This issue is raised by Jonathan Wolff (1991, p. 112).
- [52] For common ownership see Hillel Steiner (1981). For joint-ownership see G. A. Cohen (1986b).
- [53] Wolff 1991, p. 112.
- [54] Nozick, p. 177.
- [55] Steiner 1977b, p. 151.
- [56] Cohen 1986a, p. 127. See also the whole section in which Cohen discusses other baselines and argues the worsening by exploitation.
- [57] Schmidtz 1990.
- [58] Service 1975, p. 285.

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